

COMMENTS: COPYRIGHT AMENDMENT BILL

<p>The submission date for comments on the proposed amendments to the Copyright Amendment Bill [B 13D – 2017] (the amendment Bill) to the Western Cape Provincial Parliament's Standing Committee on Finance, Economic Opportunities and Tourism is 10 March 2023.</p>		
Clause <i>(Indicate clause number)</i>	Comment <i>(State why the clause or proposed amendment is not supported or what the problem is with the provision)</i>	Suggestion <i>(Suggested deletion/amendment/ addition)</i>
<p>The Western Cape Government does not support the amendment Bill in its current form.</p>		
<p>General comment</p>	<p>With the existing Copyright Act, 1978 (Act 98 of 1978) (the Act), being outdated and ineffective, the amendment Bill has been developed over a number of years to bring alignment between South Africa's copyright law and the digital era, as well as developments in intellectual property at a multilateral level. The amendment Bill will allow South Africa to comply with international treaties and conventions which require the country's domestic legislation to be consistent with international imperatives. Beyond this, there are several competing considerations which require heeding, chief amongst which is the delicate balance between intellectual property legislation that is cognisant of the need to improve access to key information and learning resources in light of South Africa's social and economic background and the ever-evolving digital space; whilst also ensuring that the livelihoods of creators and copyright holders are sufficiently protected from exploitation.</p>	
<p>General comment</p>	<p>One of the predominant concerns, which has loomed large throughout the development of the amendment Bill, has been the lack of a publicly available regulatory socio-economic impact assessment.</p> <p>The Publishers' Association of South Africa (PASA) raised these concerns in 2022, noting in particular the Bill's perceived unconstitutionality and non-compliance with international treaties.</p> <p>PASA, together with other professional and industry associations, have made numerous attempts to demonstrate the impact of the amendment Bill on the industry and the broader South African economy.</p> <p>PASA commissioned Price Waterhouse Coopers (PWC) to undertake a study on the key provisions of the amendment Bill. The overall conclusion drawn from the study is</p>	<p>It is proposed that a comprehensive socio-economic impact assessment is conducted to determine the economic impacts of the amendment Bill in its current and future forms.</p>

	<p>that the amendment Bill will have substantial impacts on the South African publishing industry, with PWC estimating that the Bill will lead to a 33 per cent reduction in book sales, and that the industry would lose 30 per cent of its jobs.</p> <p>The above findings highlight the importance of some form of economic impact assessment to ascertain the unintended consequences of introducing the amendment Bill. There appears little point in pursuing legislation that seeks to offer important social outcomes at the cost of economic expediency, with the latter having a direct correlation to the social outcomes being sought.</p>	
Clause 1(c)	Paragraph (a) of the definition of "authorized entity" refers to "the government".	If the intention is to refer to all three spheres of government then it is submitted that the wording can be improved by referring to "...any sphere of government". If the intention is to only refer to national government then a definition needs to be inserted.
Clause 1(c)	Paragraph (b) of the definition of "authorized entity" refers to "non-profit organization".	It is submitted that a definition needs to be inserted referring to the legislation in terms of which non-profit organizations are registered.
Clause 1(k)	This provision provides for the insertion of a definition for "technological protection measure circumvention device or service".	The last line in this proposed definition – "protection measure;" – needs to be underlined in its entirety to indicate the insertion.
Clause 10(b)	This provision provides for the insertion of three proposed paragraphs – (f), (g) and (h) in section 9 of the Act.	It is submitted that proposed paragraph (f) should end in a semi colon, not a full stop.
Clause 15	Clause 15 provides for the insertion of new sections in the Act. Proposed section 12A provides for general exceptions from copyright protection. This proposed section reduces the protection that a copyright owner has over his or her copyright. In this regard, four new purposes for which works may be used without	It is submitted that this deprivation is arbitrary as contemplated in section 25(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution). In <i>South African Diamond Producers Organisation v Minister of Minerals and Energy and Others</i> 2017 (6) SA 331 (CC) it was held that in order for there to be an infringement of section 25(1):

	<p>constituting copyright infringement have been introduced, namely proposed section 12A(a)(iv) to (vii). Those purposes contemplated in paragraphs (i) to (iii) are found in the existing section 12(1)(a) to (c) of the Act, which stands to be repealed. Copyright owners will no longer be remunerated for their work when it is used for purposes such as those contemplated in proposed paragraph (a)(i) to (vii). Furthermore, the wording has been amended broadening the scope of the purposes for which a work may be legitimately used. Section 12(1) of the Act provides for a closed list of purposes. Proposed section 12A(1) refers to “purposes <u>such as the following</u>”. This is an open list so copyright owners may not receive remuneration if their work is used for purposes similar to those listed. It is submitted that this substantially limits the owner's right to enjoyment of his or her property.</p>	<p>(i) The thing in question must be property. Intellectual property has been recognised by the Constitutional Court as constitutionally protectable property [<i>Laugh It Off Promotions CC v SAB International (Finance) t/a Sabmark International 2006 (1) SA 144 (CC)</i>].</p> <p>(ii) There must be deprivation which is substantial i.e. the intrusion must be so extensive as to have a legally significant impact on the rights of the affected party.</p> <p>(iii) The deprivation must be arbitrary i.e. the depriving law does not provide sufficient reason for the deprivation or is procedurally unfair.</p> <p>The purpose of the proposed legislation is presumably to provide access to copyright material without having to obtain the copyright owner's permission. However, the open list is far too wide and the circumstances in which copyright works can be used in terms of this provision are imprecise and unknown. The purpose of enhancing access to copyright material is not justified by the extent of the deprivation and weakens copyright protection.</p>
<p>Clause 15</p>	<p>It is also submitted that proposed section 12A contravenes section 22 of the Constitution which states that every citizen has a right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law.</p>	<p>In the <i>South African Diamond Producers Organisation</i> case the court held that if a legislative provision has a negative impact on the choice of trade, occupation or profession then the provision must be reasonable and justifiable in terms of the criterion in section 36(1) of the Constitution. If a legislative provision makes the practice of a trade or profession so undesirable, difficult or unprofitable that the choice to enter that trade or profession is limited, then section 22 of the Constitution is contravened as it negatively affects the “choice” element of that section. It is submitted that proposed section 12A contravenes section 22 in that its provisions are so onerous as to render the occupations of anyone who produces a work</p>

		<p>contemplated in that proposed section and who deals in copyright (e.g. an author or composer) to be undesirable, difficult or unprofitable. The provisions negatively affect a copyright owner's ability to make a living and thereby negatively affect the choice to pursue that occupation. Furthermore, proposed section 12A violates section 22 of the Constitution because there is no justification or rational reason for the provisions. As far as is known, no research has been done to determine the impact of proposed section 12A. It is therefore submitted that proposed section 12A is unconstitutional and needs to be reassessed.</p>
Clause 15	<p>Proposed section 12A(a)(i) provides for "fair use" of copyright work for research, private study or private use. Proposed paragraph (b)(iii)(bb) states that in determining "fair use" all relevant factors must be considered, including the purpose and character of the use including whether it is of a commercial nature or for non-profit research, library or educational purposes.</p>	<p>It is submitted that where the use is for commercial purposes then it cannot be considered to be "fair" for the purposes of determining an exception in terms of this provision. It is submitted that private study and private use can be undertaken for a commercial purpose. If an exception from copyright protection were to be granted for research, private study and private use for commercial purposes the effect would be to deprive the copyright owner of the fruits of his or her intellectual property for the purposes of enriching another.</p>
Clause 15	<p>Proposed section 12A(a)(iv) provides for an exception to be made in those instances where a copyright work is used for the purposes of scholarship, teaching and education. The amendment Bill does not define what is meant by "teaching" and "education". In this regard, see also proposed sections 12B(1)(e)(ii) and 12D(1).</p>	<p>It is submitted that this can be interpreted to mean informal teaching between two individuals. In such instances, an exception from copyright protection should not be granted. It is submitted that the amendment Bill should clarify what is meant by "teaching" and "education", perhaps by way of definitions.</p>
Clause 15	<p>Proposed section 12B provides for specific exceptions from copyright protection applicable to all works. Proposed section 12B(1)(a) states that copyright shall not be infringed by "any quotation". The existing</p>	<p>It is submitted that this constitutes arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. The deprivation is substantial and overly broad. Copyright owners will no longer be entitled to profit from an exploitation of a</p>

	<p>quotation exception found in section 12(3) of the Act limits the exception to literary or musical works. Proposed section 12B(1)(a) does not have this limitation and has expanded the exception considerably to include e.g. visual artistic works, which by their nature cannot be quoted but must be reproduced as a whole. Proposed section 12B(1)(c) refers to reproduction of a work by a broadcaster. Section 12(5) of the Act limits the broadcasting to literary or musical works. Proposed section 12B(1)(c) does not have this limitation and the exception has now been extended to the broadcasting of any work.</p>	<p>work as contemplated in this proposed section. It is therefore submitted that proposed section 12B needs to be reassessed.</p>
<p>Clause 15</p>	<p>Proposed section 12D provides for exceptions from copyright protection applicable to reproduction for educational and academic activities.</p>	<p>The exception from copyright protection in educational and academic activities also results in copyright owners being afforded far less protection and their right to benefit from their work is consequently limited. It is submitted that this amounts to a deprivation of property, which is arbitrary, as contemplated in section 25(1) of the Constitution. The purpose of this provision is to promote access to copyright material for educational purposes. However, it is submitted that the provision is, once again, too broad. For example, the provision permits the copying of entire books or journals if the licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions [proposed section 12D(3)] or where the book cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works [proposed section 12D(4)(c)]. It is not clear what constitutes a reasonable price or reasonable terms and conditions. These provisions can be interpreted very broadly and abused. It is submitted that the extent of the</p>

		<p>deprivation is not justified by the purpose of granting access to works for educational purposes and it is therefore arbitrary. Furthermore, many educational institutions are commercial undertakings and exist to make a profit. Should these institutions copy works in terms of proposed section 12D they will be enhancing their profits (by not having to pay royalties) at the expense of the copyright holders. It is not clear how this achieves the purpose of promoting access to copyrighted material for educational purposes.</p> <p>As with proposed section 12A, it is also submitted that proposed section 12D contravenes section 22 of the Constitution. Authors of academic works derive income through copyright by licensing the use of their works for academic purposes. Proposed section 12D deprives academic authors from profiting from their copyright work. These authors are negatively affected by this proposed section to such an extent so as to make entry into the occupation unprofitable and thereby limiting the choice to enter the occupation. It is also submitted that proposed section 24D is not reasonable as required by section 36 of the Constitution. It is therefore submitted that proposed section 12D is unconstitutional and needs to be reassessed.</p>
Clause 22	<p>Clause 22 provides for the insertion of proposed section 19C providing for general exceptions from copyright protection applicable to the protection of copyright work for libraries, archives, museums and galleries.</p>	<p>It is submitted that the exceptions regarding protection of copyright work for libraries, archives, museums and galleries also constitute an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. Proposed section 19C(3) provides for a library, archive, museum and gallery to provide "temporary access" to a copyright work to a user or another library. It is not clear from this what is meant by "access". Proposed section 19C(5)(b) permits a</p>

		<p>library, archive, museum and gallery to make a copy of a publicly accessible website for the purposes of preservation. Proposed section 19C(9) permits a library, archive, museum and gallery to make a copy of a copyright work for its own collection when the permission of the copyright owner, after a reasonable endeavor, cannot be obtained or when the work is not available by general trade or from the publisher. It is not clear from the wording what “reasonable endeavor” to obtain the permission means. Does this mean that a reasonable endeavor was made to obtain permission when the copyright owner expressly forbade the copying of the work, or does it mean that a reasonable endeavor was made to locate the copyright owner? It is submitted that these provisions constitute a substantial loss of profit for copyright owners. Furthermore, they are too broad or vague to support the purposes contemplated in the provisions and the deprivation of the copyright owner’s property is therefore arbitrary. It is therefore submitted that proposed section 19C needs to be reassessed.</p>
<p>Clause 29</p>	<p>This clause provides for the proposed insertion of proposed section 27(5A). The proposed provision reads, “Any person who at the time when copyright subsists in a work, without the authority of the owner of the copyright and for commercial purposes— (a) communicates the work...; and (b) makes the work available..., <u>which they know</u> to be infringing copyright in the work,...”.</p>	<p>In order to ameliorate the burden of establishing intent it is submitted that the words “which they know” should be amended to “which such person knows, or should reasonably have known”. It is submitted that similar wording should be inserted in proposed section 27(5C).</p>

Yours sincerely

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MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES
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